

**The Commonwealth of Massachusetts**

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**DEPARTMENT OF  
TELECOMMUNICATIONS AND ENERGY**

November 24, 2004

D.T.E. 04-4

Petition of New England Power Company for Zoning Exemption from the Town of West Boylston, Massachusetts, in the Proposed Expansion of its Wachusett No. 47 Substation.

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HEARING OFFICER RULING ON NEW ENGLAND POWER COMPANY'S MOTION  
FOR CONFIDENTIAL TREATMENT

I. INTRODUCTION

On January 20, 2004, New England Power Company ("NEP") filed with the Department of Telecommunications and Energy ("Department") a motion for confidential treatment pursuant to G.L. c. 25, § 5D ("Motion"). Specifically, the Motion requests protection of a map of the Central Massachusetts Transmission System and pages 4 and 5 of the corresponding prefiled testimony of Mr. Dean Latulipe describing the map (Motion at 1).

II. NEW ENGLAND POWER COMPANY'S POSITION

NEP states that, while the Department has construed G.L. c. 25, § 5D very narrowly in keeping with the statute's presumption that information submitted to the Department is public, the statute does allow for confidential treatment of information where the proponent can substantiate the need for nondisclosure (Motion at 2). Further, the Company states that in a recent Order, the Department noted the heightened sensitivity of certain types of information since the terrorist attack of September 11, 2001 and discussed the Legislature's recent enactment of G.L. c. 4, § 7, cl. 26(n), that exempts from the definition of public records information concerned with "utilities, transportation or other infrastructure. . . the disclosure

of which. . . is likely to jeopardize public safety (Motion at 2-3, citing, Notice of Inquiry and Rulemaking into (1) rescinding 220 C.M.R. §§ 10.00 et seq. and (2) exempting electric companies from any or all of the provisions of G.L. c. 164, § 69I, D.T.E. 98-84 (2003))).

NEP states that the Company has designated the map at issue as Critical Energy Infrastructure Information at the Federal Regulatory Energy Commission and that the portion of Mr. Latulipe's testimony that the Company is seeking to keep confidential describes the map (Motion at 1, 3). The Company asserts that full disclosure of this information is not necessary in order for the Department to make a decision regarding NEP's request for a zoning exemption for the proposed project (id. at 3).

NEP states that Mr. Latulipe's testimony has not been submitted to any other party other than the Department but that a map similar to the one at issue was submitted to ISO-NE and NEPOOL as part of the Company's Section 18.4 filing without a request for confidential treatment (September 10, 2004 Letter at 1-2). NEP states that the ISO-NE process involves only transmission owners and "[i]t is understood among members of the ISO-NE reviewing committee that such information is to be maintained in a confidential manner" (id. at 1). With respect to the NEPOOL members, the Company states that the NEPOOL reviewing committee includes "a broader range of industry interests, but NEPOOL is nonetheless limited compared to the public-at-large" (id. at 1). NEP states that, to the best of its knowledge, the documents at issue are not available to third parties (id. at 2). However, NEP states that a portion of the materials at issue have been posted by an industry organization on an unprotected, but difficult to find, area on its website for use by members of a specific organizational committee (id.).

NEP states that it was “surprised to realize this error” and has brought it to the attention of the organization (id.).

### III. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) (“specifically or by necessary implication exempted from disclosure by statute”).

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute “trade secrets, [or] confidential, competitively sensitive or other proprietary information;” second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by “proving” the need for its

nondisclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not and will not be granted automatically by the Department. A party's willingness to enter into a nondisclosure agreement with other parties does not resolve the question of whether the response, once it becomes a public record in one of our proceedings, should be granted protective treatment. In short, what parties may agree to share and the terms of that sharing are not dispositive of the Department's scope of action under G.L. c. 25, § 5D, or c. 66, § 10. See Boston Edison

Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

#### IV. ANALYSIS AND FINDINGS

NEP argues that G.L. c. 24, § 5D allows for nondisclosure when the need for such nondisclosure is substantiated and that G.L. c. 4, § 7, cl. 26(n) allows the Department to keep documents confidential when disclosure is likely to jeopardize public safety.<sup>1</sup> Here, the Company is seeking to protect information that is available on an unprotected basis in other forums. In particular, NEP has provided similar information to ISO-NE and NEPOOL committees with industry-wide memberships, without requiring the signing of non-disclosure agreements or otherwise ensuring that the materials are held confidential.<sup>2</sup> In addition, the information is currently available on an unprotected website.<sup>3</sup> In light of the availability of this

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<sup>1</sup> In D.T.E. 98-84, at 23, the Department stated that the recent enactment of St. 2002, c. 313, § 1, inserting G.L. c. 4, § 7, cl. 26(n), augments the Department's authority to accord nondisclosure protection to records containing certain sensitive information. The newly added clause 26(n) operates separate and apart from existing Department authority under G.L. c. 25, § 5D.

<sup>2</sup> I am of the opinion that a non-binding "understanding" that the documents will not be disclosed does not provide a high level of protection for such documents, particularly where diverse individuals and companies have access to the materials.

<sup>3</sup> The Company stated that the website posting of the information was done in error and that the Company has brought this error to the attention of the organization that posted the information (Exh. Sept. 10, 2004 Letter at 2). However, I note that apart from the website posting, the Company has submitted the information at issue to third parties without a request for confidential treatment. Therefore, I need not determine whether the information was unknowingly or inadvertently disclosed on a public website.

information on an unprotected basis to members of various sectors of the electric industry, I find that the documents for which the Company is seeking protective treatment have already been made public and, therefore, the Company's Motion for confidential treatment is moot. Accordingly, I hereby deny the Company's motion for confidential treatment.

As a final note, a party making a request for confidential treatment of certain documents in the future would be well advised to include in its motion a statement setting forth to the best of its knowledge the extent to which the documents in question are available to third parties via the internet or by other means.

V. RULING

New England Power Company's Motion for Confidential Treatment is denied. Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

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Jolette Westbrook, Hearing Officer

cc: Mary L. Cottrell, Department Secretary  
Commission  
Service List